No. 90-638 (3)

In The

Supreme Court of the United States

October Term 1990

JOHN BABIGIAN,

Petitioner

-against-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, JOHN BONOMI, ELEANOR PIEL, "NERVOUS NELLIE" DOE, "HORNY HELEN" DOE, STANLEY ARKIN, WILLIAM HELLERSTEIN, ROBERT MCGUIRE, PATRICK WALL, MARTIN FOGELMAN, POWELL PEIRPONT, NINA CAMERON, FRANCIS T. MURPHY, Individually and as Chief Justice of the Appellate Division of the State of New York: First Department, APPELLATE DIVISION OF THE STATE OF NEW YORK: FIRST DEPARTMENT, MICHAEL GENTILE, as Chief Counsel of the Departmental Disciplinary Committee of the Appellate Division: First Department, HAROLD J. REYNOLDS, Clerk of the Appellate Division: First Department, THE FLORIDA BAR, NORMAN FAULKNER, E. EARLE ZEHMER, ADLAI HARDIN, JR., JOSEPH W. BEL-LACOSA, RICHARD WALLACH, STEPHEN KAYE, JEFFREY K. BRINCK, ALVIN SCHULMAN, SETH ROSNER, JONATHAN H. CHURCHILL, JAMES R. HAWKINS, WILLIAMS J. MANNING, MEREDITH M. BROWN, ROBERT D. SACK, FREDERICK C. CARVER,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Florida Bar, E. Earle Zehmer,
Norman Faulkner

QUESTION PRESENTED FOR REVIEW

1. WHETHER THE DISTRICT COURT CORRECTLY DISMISSED THE COMPLAINT AGAINST THE FLORIDA BAR DEFENDANTS FOR LACK OF IN PERSONAM JURISDICTION?

2. WHETHER THE DISTRICT COURT CORRECTLY DISMISSED THE COMPLAINT FOR FAILURE TO TIMELY FILE UNDER THE APPLICABLE STATUTES OF LIMITATIONS. (BRIEF OF OTHER DEFENDANTS ADOPTED.)

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STATUTORY PROVISIONS INVOLVED

New York C.P.L.R. § 302. Personal Jurisdiction by Acts of Non-domicilaries.

a. Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state;

or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state; or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

(iii) owns, uses or possesses any real property situated within the state.

STATEMENT OF THE CASE

On February 10, 1988, Plaintiff/Petitioner John Babigian ("Babigian") filed a sixty-seven page complaint containing one hundred fifty-four paragraphs against thirty-two defendants. Among the defendants were the Florida Bar, which has its headquarters in Tallahassee, Florida and Norman Faulkner and E. Earle Zehmer, each of whom resided in Florida ("The Florida Bar Defendants"). The Florida Bar Defendants filed a motion to dismiss for lack of in personam jurisdiction and the remaining defendants filed a motion to dismiss for failure to file within the applicable statute of limitations and other various grounds.

On January 11, 1990, the District Court granted all motions to dismiss including in particular, the motion of the Florida Bar Defendants. This decision was affirmed on appeal August 10, 1990.

SUMMARY OF THE ARGUMENT

If long-arm jurisdiction exists, it would have to be under New York C.P.L.R. § 302. The factual allegations of the complaint which make reference to the Florida Bar Defendants fail to assert the necessary elements to acquire long-arm jurisdiction under any provision of the statute. The Florida Bar adopts the briefs of other defendants in support of the district court's dismissal for failure to timely file under applicable statute of limitations.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED THE COMPLAINT AGAINST THE FLORIDA BAR DEFENDANTS FOR LACK OF IN PERSONAM JURISDICTION.

Petitioner has invoked jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). Certiorari will be granted to review judgments of the United States Court of Appeals where inconsistent decisions of the Court of Appeals exist and there is need for uniformity on the issue. Magnum Import Company v. Haubigant, Inc. 262 U.S. 161, 67 L.Ed. 922, 159 S.Ct. 164, (1922); Commissioner v. Bilder, 369 U.S. 499, 8 L.Ed. 2d 65, 82 S.Ct. 881 (1962). Dismissal of Babigian's complaint against the Florida Bar Defendants was not inconsistent with existing law.

Specifically, the complaint was dismissed against the Florida Bar Defendants on the basis that the Court lacked in personam jurisdiction. Paragraph two of the complaint alleged that all three of the Florida Bar Defendants were citizens of and did business in the State of Florida. As there is no federal statute extending long-arm jurisdiction over the Florida citizens for

the facts alleged, in personam jurisdiction can only be had based upon the New York long-arm statute, New York C.P.L.R. § 302, which provides in pertinent part:

> Personal jurisdiction by acts of Non-Domicilaries
>
> a. Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domicilary or his executor or administrator, who in person or through an agent:
>
> ••••
>
> (2) commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act...

New York has given a restrictive interpretation to this provision. It is not sufficient, for purposes of this subsection, that a tortious act be committed outside the state resulting in injury in the state. Rather, it has been held necessary that defendant actually be physically present within the state of New York at the time of the allegedly tortious act. Dogan v. Harbert Construction Corporation, 507 F. Supp. 254 (S.D.N.Y. 1980); American Edestal, Inc v. Maier, 460 F.Supp. 613 (S.D.N.Y. 1978); Lynn v. Cohen, 359 F. Supp 565 (S.D.N.Y. 1973);

The only the act of the Florida Bar Defendants alleged in the complaint which has any connection with the state of New York is the sending of two letters by Defendant Faulkner to the General Counsel of the New York State Bar Association. Mailing of letters into New York, even when alleged to be a tortious act, are insufficient to establish long-arm jurisdiction under § 302. American Edestal, supra. See also Fox v. Boucher, 794 F.2d 34 (2nd Cir. 1986) (Tortious telephone telephone call to party in New York from outside the state is not sufficient to establish jurisdiction).

Babigian attempts to distinguish this well established line of cases by making conclusory allegations of a conspiracy involving the Florida Bar Defendants along with the remaining defendants. There are situations where a person is subject to the New York long-arm jurisdiction on the basis that his co-conspirator was committing the tortious activities in New York. Ghazoul v. International Management Services, Inc., 398 F. Supp 307 (S.D.N.Y. 1975). However, bald allegations of conspiratorial acts or agency are insufficient to form the basis of jurisdiction. In Singer v. Bell, 585 F. Supp. 300, 303 (S.D.N.Y. 1984), the Court stated:

> Instead, plaintiffs must make a prima facia showing of conspiracy. They must allege specific facts warranting the inference that the defendants were members of the conspiracy, and come forward with some definite evidentiary facts to connect the defendants with transactions occurring in New York.

As in Singer, the specific facts alleged in the complaint clearly do not establish any basis for a conspiracy. They also fail to establish an agency relationship between The Florida Bar and Bonomi existed.

Federal courts, including this Court, and New York courts have held that the agency relationship which subjects a non-domicilary to jurisdiction under Section 302 requires that the agent have acted for the benefit of the non-resident defendant and that the defendant have retained a degree of control over the agent. Grove Press, Inc. v. Angleton, 649 F.2d 121 (2d Cir. 1981); Marsh v. Kitchen, 480 F.2d 1270 (2d Cir,. 1973); Louis Marx & Inc. v. Fugi Seiko Co., Ltd., 453 F. Supp. 385 (S.D.N.Y. 1978); Legros v. Irving, 354 N.Y.S. 2d 47 (S.Ct..1973); Collateral Factors Corp v. Meyers, 330 N.Y.S. 2d 833, 39 A.D. 2d 27 (N.Y.S.C., App. Div. 1972). In the case at Bar, the Florida Bar Defendants are alleged to have simply sent letters to the General Counsel for the New York Bar requesting the New York Bar to consider taking action against the Plaintiff. There was no allegation of any retention

control over the New York Bar and no such allegation could be sustained. Clearly, The Florida Bar has no control whatsoever over the decision of The New York State Bar Association as to whether or not to take disciplinary action against an individual. Additionally, the complaint indicates no benefit to be derived by the Florida Bar Defendants. For purposes of the New York Statute, an intended general benefit to the government or to the the public at large is insufficient to subject public servants to The New York Long Arm Long Statute for acts taken in their official capacities. Grove Press, Inc. v. Angleton, 649 F. 2d 121 (2nd Cir. 1981). Hence the trial court and the appellate court's decision to dismiss the complaint against the Florida Bar Defendants was consistent with existing case law.

Finally, Babigian argues that the district court erred by failing to receive affidavits before ruling on the motion of the Florida Bar Defendants. He argues that the court cannot dismiss for want of jurisdiction without discovery. Cases which he cites are clearly inapplicable to a complaint, such as that in the case at bar, where the allegations themselves fail to state a cause of action. In short, the complaint utterly fails to allege the minimum facts necessary to establish long arm jurisdiction and the district court was correct in dismissing the complaint for lack of jurisdiction.

II. THE DISTRICT COURT CORRECTLY DISMISSED THE COMPLAINT FOR FAILURE TO FILE WITHIN THE TIME LIMITS OF THE APPLICABLE STATUTE OF LIMITATIONS.

The District Court also dismissed the complaint on the ground that the Plaintiff failed to file the action within the time limitations established by the applicable statutes of limitations. The Florida Bar Defendants join the briefs filed by the other defendants in this action in support of this ground.

CONCLUSION

The decisions of the lower courts were not divergent from existing case law, hence, Babigian's Petition for Writ of Certiorari should be denied under 28 U.S.C. § 1254(1).

Respectfully submitted,

BARRY S. RICHARD

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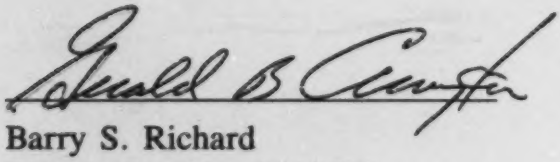

Barry S. Richard
Florida Bar No: 0105599

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been served by U.S Mail/Hand Delivery on John Babigian, Petitioner Pro Se, One Christopher Street, New York, New York, 10014; Thomas J. Schwarz, Jay S. Berke, Rosalie B. Shields of Skadden, Arps, Slate, Meagher & Flom, 919 Third Avenue, New York, New York 10022; James M. Davis, Jo-Anne Weissbart, at Owen & Davis, 605 Third Avenue, New York, New York 10158; Robert Abrams, Attorney General for the State of New York; 120 Broadway, New York, New York, 10271 this 20 day of November, 1990.

Barry Richard